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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUSTIN CERRONE SKANNAL, Defendant and Appellant.	H044449 (Santa Clara County Super. Ct. No. F1558194)

Defendant Justin Cerrone Skannal challenges the indeterminate third strike sentence imposed following his convictions by jury for attempted murder, assault with a deadly weapon, and making criminal threats. All charges arose from an incident where defendant kicked down the door of an apartment and repeatedly stabbed the mother of his estranged wife. Defendant argues his convictions must be reversed because the trial court erred by denying his motion to represent himself and by failing to instruct the jury sua sponte regarding unanimity, expert testimony, and a lesser included offense. As we will explain, the lack of instructions on unanimity and the lesser included offense of attempted criminal threats prejudiced defendant, but only as to the criminal threats conviction. We will therefore reverse the judgment and remand the matter for possible retrial on that count.

I. TRIAL COURT PROCEEDINGS

Defendant was charged by information with attempted murder (Pen. Code, §§ 664, 187; unspecified references are to this Code), assault with a deadly weapon (§ 245, subd. (a)(1)), and two counts of making criminal threats (§ 422). (One of the criminal threats counts was later dismissed at the prosecution's request.) As to the attempted murder count, the information alleged defendant personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1203, subd. (e)(3)) and personally used a deadly weapon (§ 12022, subd. (b)(1)). As to the assault with a deadly weapon count, the information alleged defendant personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1203, subd. (e)(3)) and personally used a deadly weapon (§ 1192.7, subd. (c)(23)). The information alleged three prior strike convictions (§ 667, subds. (b)–(i)), two prior serious felony convictions (§ 667, subd. (a)), and three prior prison terms (§ 667.5, subds. (a), (b) [one violent felony prior prison term, and two other prior felony prison terms]).

As discussed in more detail below, months before trial defendant sought to replace his appointed trial counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), and then moved to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). The trial court denied both motions without prejudice. Regarding the *Faretta* motion the court added, "I'm not saying it is not going to happen, I'm just saying we need to talk more about it." Defendant did not raise the *Faretta* issue again until after trial.

A. TRIAL EVIDENCE

1. Testimony of Tony Baker

Tony Baker lived in a three-bedroom apartment in Gilroy with Zelma Lane.[1] Lane's daughter Natosha had been living at the apartment, but had recently moved out. Natosha and defendant were legally married, although not living together. Baker had

[1] Consistent with the record, the opinion uses female pronouns to refer to Baker.

known Lane and Natosha for over 40 years, and Baker described Lane as being like her stepmother.

Baker testified that she got out of bed between 4:30 a.m. and 5:00 a.m. on a December morning in 2015. She could not sleep after Natosha called the night before and warned Baker to lock the doors and windows because defendant was "on a rampage." (The trial court admonished the jury that Natosha's hearsay statement could be considered only for the limited purpose of explaining Baker's conduct.) Baker showered and then spoke to Lane for a few minutes before Lane returned to her bedroom and shut the door. Baker returned to her room to finish getting dressed and then heard two loud bangs. She walked toward the living room, saw the front door fly open, and watched defendant enter the apartment. Defendant said " 'I'm going to kill every motherfucking body in here.' " He asked " 'Where's Natosha,' " checked the bedroom she used to live in, and then followed Baker outside. Defendant asked Baker about Natosha again and went back inside. Baker followed him and saw him kick Lane's bedroom door open. As he entered the bedroom Baker heard defendant say, " 'You black bitch.' " After Baker heard Lane scream, she ran out of the apartment and hid behind a dumpster nearby. She then ran to another apartment and asked the occupant to call 911. (A recording of the 911 call was admitted into evidence and played for the jury). Baker did not see a weapon in defendant's hand.

At trial, Baker did not recall defendant directing threats specifically at her. The prosecutor asked if she remembered telling an investigating police officer that defendant told her " 'Don't play with me, 'cause I'll kill your ass.' " Baker responded: "I don't recall -- there was so much going on." Regarding defendant's reference to killing everyone in the apartment, Baker testified that she did not feel the statement was directed at her. She testified she "wasn't scared" and "kind of really just brushed it off." When asked if she was afraid for her safety, Baker responded: "Yes. Somewhat I was. I was and I wasn't. You know, because he never really ever threatened me. So I wasn't, you

know, too much concerned." The prosecutor asked Baker why she fled the apartment and she responded, "Well, when I left -- when I went out and left the apartment, that's when he -- I guess I seen a rage in him, and then when he went to Zelma's door, that's what made me go on, and because I knew it was serious then."

On cross-examination Baker acknowledged she had two prior felony convictions. Defense counsel also asked Baker about Lane's mental health. Baker acknowledged that in the past 10 years Lane had started "talking to herself, looking up in the sky, and talking to whoever she was talking to." She occasionally talked nonsensically, talked about things that had not actually happened, and mentioned communicating with the U.S. government via satellite. Baker described Lane as "out to lunch," but still "knew what she was doing." Baker confirmed when asked on redirect that Lane was "able to recognize people she knows."

2. Testimony of Zelma Lane

Zelma Lane testified she was in bed early one morning when she heard a noise and saw her locked bedroom door crash open. She saw a large, African American male coming toward her. The man asked her where Natosha was. Though she could not see his face clearly, Lane recognized the man's voice as belonging to defendant. She was very familiar with his voice because she had known him for seven years. She yelled that Natosha was in Arizona, and then defendant started stabbing her with a "large silver blade hunting knife with a black handle." Lane displayed in court a series of scars around her shoulders and near her neck to show the areas where she had been stabbed. The attacker left after about 15 seconds, and Lane called 911 and crawled to the living room. Lane explained that she had heard defendant complain in the past about Natosha allowing Lane to live in the apartment without paying rent.

3. Police Investigation

A Gilroy Police Department officer arrived within a few minutes after the assault. He entered the apartment with one other officer and saw Lane on the living room floor

covered in blood. The officer conducted a protective sweep of the apartment and then photographed the scene while Lane received medical attention. The officer authenticated pictures he had taken the morning of the stabbing, which were admitted into evidence.

Another Gilroy Police Department officer arrived soon after and interviewed Baker who appeared very emotional, fearful, and anxious. Baker reported that when defendant followed her outside before going into Lane's bedroom he told her, " 'Don't play with me, bitch. I'll kill your ass.' " Baker told the officer that defendant's statement made her fear for her life.

A third Gilroy Police Department officer who was part of the department's crime scene investigation team testified as an expert in blood smear and blood spatter analysis. He opined that blood marks on the apartment's hallway walls were consistent with someone moving away from the bedroom and toward the living room (which is where Lane was discovered by the police). He noted there was a "significant amount of blood on both countertops and the floor of the kitchen."

4. Testimony of Dr. Christopher Traver

Doctor Traver was the trauma surgeon who treated Lane in the emergency room. She had multiple lacerations and stab wounds on her upper body (including to her head, left ear, left side of her neck, left shoulder, left upper arm, right trapezius muscle between the neck and the shoulder, and one of her thighs). Some wounds were deep and others superficial. The stab wound to her shoulder was potentially life-threatening because it had lacerated a major vein and was actively bleeding. She was in hemorrhagic shock from blood loss, which caused temporary hypertension and a rapid heart rate. The doctor performed surgery to stop the bleeding from the lacerated vein and sutured the lacerations on her skin. Lane remained in the hospital for two days after the surgery.

B. JURY INSTRUCTIONS, VERDICT, AND SENTENCING

Neither party requested—and the trial court did not give sua sponte—a jury instruction regarding unanimity (CALCRIM No. 3500), despite the multiple acts that

could form the basis of the criminal threats count. Similarly, no instruction was requested or given on the lesser included offense of attempted criminal threats or on the jury's consideration of expert testimony (CALCRIM No. 332). The jury found defendant guilty of all three counts tried and found true the allegations of personal infliction of great bodily injury and personal use of a deadly weapon. Defendant waived jury trial on the prior conviction allegations, which were found true by the court. The trial court denied defendant's motion to dismiss his prior strike convictions under *People v. Superior Court (Romero)* 13 Cal.4th 497 and sentenced defendant to an indeterminate term of 50 years to life consecutive to a determinate 26 years.[2]

II. DISCUSSION

A. THE *FARETTA* MOTION WAS PROPERLY DENIED

A criminal defendant has the right to represent himself or herself at trial under the Sixth and Fourteenth Amendments to the United States Constitution. (*Faretta, supra,* 422 U.S. at pp. 819–820.) A trial court must grant a defendant's request for self-representation if the defendant "knowingly and intelligently makes an unequivocal and timely request after having been apprised of its dangers." (*People v. Valdez* (2004) 32 Cal.4th 73, 97–98 (*Valdez*).) In assessing a *Faretta* motion, the trial court " 'should draw every reasonable inference against waiver of the right to counsel.' " (*Valdez,* at p. 98.) The trial court should deny a *Faretta* motion if, after evaluating the totality of the

[2] Defendant's sentence was calculated as follows: 25 years to life for attempted murder as a third strike (§§ 667, subds. (b)–(i), 664, 187); 25 years to life consecutive for making criminal threats as a third strike (§§ 667, subds. (b)–(i), 422, 1192.7, subd. (c)(38)); three years for personally inflicting great bodily injury related to the attempted murder conviction (§ 12022.7, subd. (a)); one year for personally using a deadly weapon related to the attempted murder conviction (§ 12022, subd. (b)(1)); 11 years for two prior serious felony convictions and one prior prison term related to the attempted murder conviction (§§ 667, subd. (a); 667.5, subd. (b)); and 11 years for two prior serious felony convictions and one prior prison term related to the criminal threats conviction (§§ 667, subd. (a); 667.5, subd. (b)). All other sentences were imposed and stayed (§ 654).

circumstances, the court concludes the motion was ambivalent, made in passing anger or frustration, or made to delay the orderly administration of justice. (*Valdez*, at pp. 98–99.) The improper denial of a timely and unequivocal *Faretta* motion is an error of constitutional dimension and is therefore per se reversible. (*Valdez*, at p. 98.) We review the trial court's ruling on defendant's *Faretta* motion de novo. (*People v. Dent* (2003) 30 Cal.4th 213, 218.)

About a week after being held to answer (and several months before trial), defendant made a *Marsden* motion, which the trial court denied. Immediately after the court denied the *Marsden* motion, defendant filed a *Faretta* motion on a court form he had filled out by hand. Defendant told the court: "I just want somebody with some legal type of representation. If I can't have an attorney, I just want somebody that will fight for me. [¶] My attorney -- I don't have nothing against her, but basically she's just willing to go in there and try to get me one life sentence[] instead of two, and I believe that I should have a fair chance of fighting this trial with somebody on my side being impartial. Already, she said I'm kind of guilty, so I seriously doubt that she'll give me adequate enough assistance as being my counsel." The court responded: "So I think I hear you saying, all things being equal, you prefer to have an attorney represent you, just not this one because this one has a bit of a bias." Defendant responded: "So if I don't ask her, I have no choice but to fight for myself." The court denied the motion without prejudice for two stated reasons: "I think the defendant is mostly disappointed that that *Marsden* motion was not granted"; and "it does not appear that he wants to represent himself" but rather he "simply doesn't want this particular attorney to represent him." The court told defendant it would put the motion "in the court file and we can take it up again at the next court appearance," and also informed defendant that "[u]ltimately, if you want to represent yourself, it is a right." The court concluded, "I'm not saying it is not going to happen, I'm just saying we need to talk more about it." Defendant did not raise the *Faretta* issue again until after trial.

Defendant argues his *Faretta* motion was both timely and unequivocal. Made months before trial, we agree the motion was timely. But we find no error in the trial court's conclusion that the motion was made out of frustration over an unsuccessful *Marsden* motion rather than out of a steadfast interest in self-representation. After filing his *Faretta* motion, defendant explained: "I just want somebody with some legal type of representation. If I can't have an attorney, I just want somebody that will fight for me." He told the court he did not think his current appointed counsel would fight for him, and then stated "I believe that I should have a fair chance of fighting this trial with somebody on my side being impartial." The trial court inferred that defendant's statements were an attempt to relitigate the *Marsden* motion instead of an attempt to forego appointed counsel altogether and defend the case himself. Given that the statements occurred within minutes of the trial court denying the *Marsden* motion, that inference was reasonable. (*Valdez*, *supra*, 32 Cal.4th at pp. 98–99.) We acknowledge defendant stated "if I don't ask her [(his appointed counsel)], I have no choice but to fight for myself." But considered in the context of his comments as a whole, that statement does not unequivocally demonstrate that defendant wanted to waive his right to counsel and represent himself.

Given the contextual similarity, *Valdez* is instructive here. (*Valdez*, *supra*, 32 Cal.4th 73.) After the trial court denied Valdez's *Marsden* motion, he "continued to complain that his counsel's representation was inadequate." (*Valdez*, at p. 98.) Valdez also stated: " '[I]f I want to go pro. per. in this case I could do that.' " (*Id.* at p. 99.) The Supreme Court concluded that Valdez's "use of the conditional 'if' shows that his statement was ambivalent and equivocal." (*Ibid.*) The court further reasoned that Valdez's "statement was ambiguous and cannot be deemed to have constituted an articulate and unmistakable demand for self-representation." (*Id.* at p. 100.)

Defendant relies almost exclusively on *United States v. Hernandez* (9th Cir. 2000) 203 F.3d 614 (*Hernandez*), (overruled on other grounds as explained in *United States v.*

Ferguson (9th Cir. 2009) 560 F.3d 1060, 1068, fn. 4). After the district court refused to appoint new counsel for Hernandez, he told the court: " 'Well, I mean, if you can't change him, I'd like to represent myself, with an interpreter, if you don't want to assign [another attorney].' " (*Hernandez*, at p. 617.) The court responded that Hernandez hadn't given the court sufficient cause to allow him to represent himself, and proceeded to ask him questions to " 'evaluate whether you have some basic capability to defend yourself.' " (*Id.* at pp. 617–618) The district court denied the *Faretta* request, reasoning that " 'defendant is not capable of defending himself.' " (*Id.* at p. 618.) The appellate court reversed, finding that Hernandez's request was unequivocal, and that the district court had "acknowledged the unambiguous character of the request by stating that he was willing to grant it and by then beginning a dialogue with Hernandez to determine whether it was voluntary and intelligent." (*Id.* at p. 621.) The *Hernandez* court concluded the district court apparently denied the request because it decided Hernandez did not know enough about the legal issues in the case, also noting the district court's "impatient resistance" to Hernandez's request. (*Id.* at pp. 621–622.)

In addition to being intermediate federal authority and therefore non-binding (*People v. Williams* (1997) 16 Cal.4th 153, 190), *Hernandez* is factually distinguishable. The district court rejected Hernandez's unequivocal request to represent himself based on Hernandez's lack of legal training, which is not a valid reason to deny an unequivocal *Faretta* motion. Further, unlike Hernandez's clear statement that "I'd like to represent myself" (*Hernandez*, *supra*, 203 F.3d at p. 617), defendant here described wanting "somebody that will fight for me." We conclude that the trial court properly denied defendant's motion based on the legally supportable conclusion that it was made in passing anger or frustration prompted by an unsuccessful *Marsden* motion. Defendant has not demonstrated *Faretta* error.

B. JURY INSTRUCTIONS ON THE CRIMINAL THREATS COUNT

1. The Trial Court Should Have Instructed on Unanimity

"In a criminal case, a jury verdict must be unanimous." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; citing Cal. Const., art. I, § 16.) Generally, when one crime is charged and the "evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty." (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) But a "unanimity instruction is not required if 'the defendant offered the same defense to both acts constituting the charged crime, so no juror could have believed defendant committed one act but disbelieved that he committed the other, or because "there was no evidence from which the jury could have found defendant was guilty of" the crime based on one act but not the other.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 879 (*Covarrubias*).) "Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless." (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853 (*Thompson*).)

Two acts could form the basis of defendant's criminal threats conviction: the statement related by Baker that immediately after defendant entered the apartment he said he would " 'kill every motherfucking body in here,' " and the statement after following Baker outside, " 'Don't play with me, bitch. I'll kill your ass.' " It is undisputed that the prosecutor never elected one of the two as the sole basis for the criminal threats count. Contrary to the People's contention that defendant offered the same defense to both acts, misidentification was not the only defense theory; defense counsel alternatively argued in closing that there was insufficient evidence of a threat having been made. Further, Baker's inability to remember whether defendant uttered the second of the two statements

was a reason for the jury to distinguish between the two acts. We therefore cannot say the jury must have believed beyond a reasonable doubt that defendant committed both acts if he committed any. (See *Thompson*, *supra*, 36 Cal.App.4th at p. 853.) Because the jury verdict could be based on some jurors believing defendant made one threatening statement and some believing he made the other threatening statement, the jury should have been given a unanimity instruction.

2. The Trial Court Should Have Instructed on Attempted Criminal Threats

A jury may convict a defendant of "any offense, the commission of which is necessarily included in that with which he is charged." (§ 1159.) Trial courts have a sua sponte duty to " 'instruct a criminal jury on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed.' " (*People v. Smith* (2013) 57 Cal.4th 232, 239.) The People concede, and we agree, that the trial court erred by failing to instruct on the lesser included offense of attempted criminal threats. (*People v. Toledo* (2001) 26 Cal.4th 221, 230.) Had the jury been given that instruction and believed Baker's testimony that a threat was uttered but that she did not subjectively feel threatened, it could have found defendant guilty of only an attempted criminal threat. (*Id.* at p. 231.)

3. Considered Together, the Instructional Errors Were Prejudicial

"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, ... unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) Though defendant contends that failure to instruct on a lesser included offense amounts to federal constitutional error, we are bound by our Supreme Court's conclusion that "the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility." (*People v. Breverman* (1998) 19 Cal.4th 142, 165.) The state law miscarriage of justice test "is not met unless it

appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred." (*Id.* at p. 149, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) As for the failure to instruct on unanimity, appellate districts differ as to whether the federal or state harmless error standard applies. (See *People v. Vargas* (2001) 91 Cal.App.4th 506, 561–562 [noting split of authority, and analyzing error for *Watson* prejudice]; see also *Covarrubias*, *supra*, 1 Cal.5th at p. 878 ["Jury unanimity is not required as a matter of federal due process."].) We need not determine here which standard applies because we find prejudice under even the more deferential *Watson* standard.

As discussed, the criminal threats conviction could have been based either on defendant's statement that he was going to " 'kill every motherfucking body in here,' " or on the statement " 'Don't play with me, bitch. I'll kill your ass.' " Baker could not recall at trial whether defendant made the second statement at all. And she unequivocally described not feeling threatened by any statement defendant made. She testified that "because he never really ever threatened" her she "wasn't, you know, too much concerned." She explained that she left the apartment despite not feeling threatened because she saw a "rage in him ... when he went to Zelma's door."

The People argue that Baker's testimony about not being frightened by defendant's statements "is not strong enough to create a reasonable probability that the jury would have made such a finding had it been properly instructed." But a reasonable jury could have credited her testimony and concluded that Baker became concerned when defendant began kicking down doors rather than because of any statement he made. That factual determination would have supported a conviction for only the lesser included offense of attempted criminal threats, because the greater offense requires that the threatening statement itself "causes [the victim] reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety." (§ 422.)

Baker's inability at trial to remember one of the two statements being made further supports the likelihood of the lesser verdict. The People argue "it is unlikely that the jurors found the threat outside the apartment ... did not occur based on Baker's claimed inability to remember the threat, and they certainly would not have found an *attempted* threat based on that testimony or the testimony" of the police officer about Baker reporting the threat to him and telling him the threat made her fear for her life. But Baker's testimony created two questions for the jury: whether the threat outside the apartment occurred at all, and if so whether Baker subjectively felt threatened by it. A proper instruction regarding attempted criminal threats would have given the jury an alternative to consider. Defendant has demonstrated that a more favorable outcome on the criminal threats count is reasonably probable had the jury been properly instructed.

C. JURY INSTRUCTIONS ON EXPERT TESTIMONY

The parties agree that the trial court committed state law error by not instructing the jury sua sponte on how to assess the expert testimony about blood smear/spatter evidence and the victim's stab wounds. (See *People v. Daniels* (1991) 52 Cal.3d 815, 885 [trial courts have a "duty to instruct sua sponte on those general principles relating to the evaluation of evidence," including "expert testimony"].) But the People contend the error was harmless because it is not reasonably probable a result more favorable to defendant would have occurred had the jury been properly instructed. (Citing *People v. Reeder* (1976) 65 Cal.App.3d 235, 243.)

Section 1127b states that when expert testimony is received in a criminal proceeding, "the court shall instruct the jury substantially as follows: [¶] Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be

found by them to be unreasonable." CALCRIM No. 332 is the standard instruction that substantially tracks section 1127b.

Defendant argues the expert testimony was used to fill evidentiary gaps such as the police never finding the knife used in the assault; the minimal forensic evidence introduced at trial; and Lane's inability to see her attacker's face (though she did identify defendant as the attacker from his voice). Defendant contends the expert evidence helped to show that he was the attacker; that he was armed before entering the residence; that he intended to kill someone; and the "depth of emotion suggesting a domestic motive was at play." But he does not explain how expert descriptions of blood transference in the residence and the nature of Lane's injuries connected him to the crime. Though expert testimony about stab wounds provided evidence that a knife was used, the expert testimony did not connect defendant to the crime; it was the identifications by Baker and Lane that made that connection.

The officer's testimony about the amount of blood observed in the residence helped demonstrate the extent of Lane's injuries by showing she had bled extensively, but that testimony was corroborated by a percipient witness as well as crime scene photographs admitted at trial. The officer's testimony about blood smear and blood spatter was therefore only marginally relevant to the case. We see no reasonable probability the jury would have decided the case more favorably to defendant had it been instructed about how to assess the officer's expert testimony.

As for Doctor Traver's testimony about Lane's diagnosis and treatment, defendant points to nothing in the record that might call into question the accuracy of the doctor's testimony. Doctor Traver gave a clinical description of Lane's injuries and the treatment he provided. He testified that one of the stab wounds was potentially life-threatening, and no evidence in the record calls that into question. There would have been no basis for the jury to discredit the doctor's testimony even with a proper instruction.

We do not view the expert evidence as leading to the findings defendant identifies. We therefore find the trial court's failure to comply with section 1127b was harmless.

D. CUMULATIVE PREJUDICE

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid.*)

We have discussed three errors arising from the absence of jury instructions on unanimity, the lesser included offense of attempted criminal threats, and the assessment of expert testimony. The first two errors were prejudicial as to the criminal threats conviction, requiring reversal of that count only. Given our conclusion that the third error did not affect the verdict, as well as the narrow scope and impact of the prejudicial errors, the effect of all three instructional errors combined is not so great overall as to have deprived defendant of a fair trial.

E. RESENTENCING

Our disposition requires that defendant be resentenced, whether or not he is retried on the criminal threats count. We address defendant's sentencing arguments to provide guidance to the trial court on remand.

1. The Prior Prison Term Enhancements Must Be Stricken

The prior prison term enhancements (§ 667.5) that were stayed because they were based on the same convictions as the prior serious felony enhancements (§ 667, subd. (a)) must instead be stricken.

In *People v. Jones* (1993) 5 Cal.4th 1142 (*Jones*), the Supreme Court determined that a sentence cannot be enhanced with both a prior prison term and a prior serious felony conviction based on the same prior event. (*Id.* at pp. 1144–1145.) The *Jones* court reversed the judgment that had imposed both enhancements with directions to strike

the prior prison term enhancement, as that was the shorter of the two imposed. (*Id.* at p. 1153.) (The court did not explain why it instructed the trial court to strike rather than stay the enhancements.)

The People contend the enhancements need not be stricken, relying predominantly on *People v. Gonzalez* (2008) 43 Cal.4th 1118 (*Gonzalez*) and *People v. Brewer* (2014) 225 Cal.App.4th 98 (*Brewer*). In *Gonzalez* the Supreme Court interpreted the language of two firearm enhancements (sections 12022.53 and 12022.5) and concluded "section 12022.53 requires that, after a trial court imposes punishment for the section 12022.53 firearm enhancement with the longest term of imprisonment, the remaining section 12022.53 firearm enhancements and any section 12022.5 firearm enhancements that were found true for the same crime must be imposed and then stayed" rather than stricken. (*Gonzalez*, at pp. 1122, 1130.) We note the *Gonzalez* court did not mention the earlier decision in *Jones*, either to reject it or to indicate that trial courts were applying *Jones* incorrectly by striking enhancements.

The *Brewer* court considered the proper treatment of two prior prison term enhancements imposed under section 667.5, subdivision (b) that involved the same conduct as two prior violent felony enhancements imposed under subdivision (a) of that section. (*Brewer, supra*, 225 Cal.App.4th at pp. 102–103.) The *Brewer* court determined that the enhancements should remain stayed under section 654 rather than be stricken based on the reasoning of *Gonzalez* as well as *People v. Lopez* (2004) 119 Cal.App.4th 355 (in which the appellate court approved the trial court's decision to sentence the defendant as a habitual sex offender (§ 667.71) and impose and then stay a sentence under the one strike law (§ 667.61)). (*Brewer*, at pp. 104–105.) Like *Gonzalez*, *Brewer* did not address *Jones*.

Intermediate appellate courts have generally followed *Jones* and ordered the prior prison term enhancements stricken. (E.g., *People v. Gonzales* (1993) 20 Cal.App.4th 1607, 1610; *People v. Harris* (1994) 22 Cal.App.4th 1575, 1585.) We

will likewise follow the Supreme Court's disposition from *Jones* and order the section 667.5 enhancements stricken upon resentencing (unless the trial court exercises its recently conferred discretion to strike any of the section 667 enhancements in the interest of justice, which we discuss next).

2. Recent Amendments to Prior Serious Felony Enhancements

In supplemental briefs, the parties agree that upon resentencing the trial court must consider amendments to section 1385 added by Senate Bill No. 1393, which became effective in January 1, 2019. At the time defendant was sentenced, subdivision (b) of section 1385 provided: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." Beginning in 2019, trial courts now have discretion to strike prior serious felony conviction enhancements in furtherance of justice. As the People note, appellate courts have consistently found similar legislation that ended a statutory prohibition on striking certain firearm enhancements to apply retroactively to non-final judgments. (Citing *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–509.) Therefore, upon resentencing the trial court here will have discretion and therefore must decide whether to strike defendant's prior serious felony conviction enhancements.

III. DISPOSITION

The judgment is reversed and the matter is remanded for possible retrial on count three (criminal threats). At the conclusion of any retrial on count three, or if the prosecution elects not to retry that count, the court shall resentence defendant consistent with part II.E of this opinion.

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Grover, J.

WE CONCUR:

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Greenwood, P. J.

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Danner, J.